

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD**

TEMPLE UNIVERSITY HOSPITAL, INC.	:	
	:	
Employer	:	
	:	
and	:	Case No. 04-RC-162716
	:	
TEMPLE ALLIED PROFESSIONALS, PENNSYLVANIA ASSOCIATION OF STAFF NURSES AND ALLIED PROFESSIONALS (PASNAP)	:	
	:	
Petitioner	:	

PETITIONER’S RESPONSIVE BRIEF

Petitioner Temple Allied Professionals, Pennsylvania Association of Staff Nurses and Allied Professionals (“PASNAP” or “Union”) submits this Responsive Brief to Temple University Hospital, Inc.’s (“Employer” or “TUH”) Brief on Review, as permitted by the Board’s December 29, 2016 Order Granting Review in Part and Invitation to File Briefs.

I. INTRODUCTION

In its Brief on Review, the Employer essentially reiterates the arguments made in its Request for Review. The Union addressed these arguments initially in its Opposition to the Request for Review then more thoroughly in its own Brief on Review. The purpose of the present brief is to supplement the arguments made in these earlier briefs in light of the Employer’s Brief on Review.

II. THE EMPLOYER’S ARGUMENTS IGNORE MANAGEMENT TRAINING, PENNSYLVANIA VIRTUAL CHARTER SCHOOL, AND HYDE LEADERSHIP CHARTER SCHOOL

The Employer devotes a substantial portion of its Brief on Review to rehashing its argument that the Board should decline jurisdiction over it because of its ties to an exempt entity, Temple University (“University”) (Emp. Br. at 3-12). The Employer lists instances where it and the University come into contact, such as “[the University] provides [Temple University Health Systems’ (“TUHS”)] external internet connectivity” and “TUH employees have e-mail addresses that are @tuhs.temple.edu [while] [University] employees have email [sic] addresses that are @temple.edu” (Emp. Br. at 6-10). However, the Employer never explains *why* any of the listed ties should have any impact upon the Board’s decision as to whether to assert jurisdiction, and a review of the ties reveals that none of them has anything to do with collective bargaining or employee rights under the Act.

Instead, when it comes to collective bargaining and employee rights under the Act, the Employer and the University have no meaningful ties. The Employer stipulated that it is not a single employer with the University (DDE at 3) and has not challenged the Acting Regional Director’s (“ARD”) factual finding that the University “do[es] not negotiate the collective-bargaining agreements covering [TUH] employees...cannot bind [TUH] to grievance settlements or collective-bargaining agreements,” and “plays no role in the day-to-day functioning of labor relations at [TUH]” (DDE at 6). Thus, the Employer is fully capable of bargaining with its employees’ representatives under the Act regardless of whether the University is under the Act also. That the Employer interfaces with the University in ways having absolutely no bearing on collective bargaining is irrelevant to whether the Board should assert jurisdiction over the Employer.

Moreover, even if the University did exercise control over the Employer bearing on collective bargaining—which it does not—the Employer has never explained how this control could possibly be relevant to the Board’s exercise of jurisdiction over the Employer in light of *Management Training*, 317 NLRB 1355 (1995), *Pennsylvania Virtual Charter School*, 364 NLRB No. 87 (2016), and *Hyde Leadership Charter School—Brooklyn*, 364 NLRB No. 88 (2016) (Emp. Br. at 5-11). As explained in detail in the Union’s Brief on Review (U. Br. at 7-10), in these cases, the Board held that the fact that an exempt entity exercises control over the terms and conditions of employment of an employer’s employees is not grounds for discretionarily declining jurisdiction over the employer. See *Management Training*, *supra* at 1358; *Pennsylvania Virtual*, *supra*, slip op. at 10; *Hyde Leadership*, *supra*, slip op. at 8-9. The Employer has not even attempted to explain how the Board could decline jurisdiction over it on the basis of control exercised by the University without violating these cases (Emp. Br. at 5-11). Thus, even if the Employer had established that the University exercised control over its labor relations, this control would not be a proper basis for the Board to decline jurisdiction.

The Employer also argues that the Board should decline jurisdiction because some of the Employer’s employees work alongside some of the University’s employees and it would not be proper for its employees to be subject to the Act while the University’s employees were not (Emp. Br. at 11-12). However, the Board will assert jurisdiction over an employer even where the employer’s employees work alongside employees of an exempt employer. Thus, in *Recana Solutions*, 349 NLRB 1163, 1163 (2007), employees of an employer subject to the Act “work[ed] alongside with and share[d] the same supervision as City employees,” and the Board still asserted jurisdiction over the employer. Similarly, in *Aramark Corp.*, 323 NLRB 256, 257 (1997), “[b]oth Duval County employees and employees of the Employer occup[ied] the

positions of cook, cashier, and food service assistant and these employees work[ed] side by side at the various sites.” The Board asserted jurisdiction over the employer notwithstanding these facts. *Id.* at 256. Thus, the fact that an employer’s employees work alongside an exempt employer’s employees, or even perform the same duties or share supervision with an exempt employer’s employees, is not grounds for declining jurisdiction over the employer.

The Employer cites *Northwestern University*, 362 NLRB No. 167 (2015), for the proposition that the fact that its employees work alongside University employees is a reason to decline jurisdiction (Emp. Br. at 11-12). *Northwestern* is inapposite. The Board in *Northwestern* went to great pains to emphasize that its consideration of the fact that it could not regulate most NCAA Division I Football Bowl Subdivision teams was “peculiar to th[at] case” because “[o]ther industries...are not characterized by the degree of interrelationship present among and between teams in a sports league.” *Id.*, slip op. at 5 fn. 22; *accord*, *Airway Cleaners, LLC*, 363 NLRB No. 166, slip op. at 1 fn. 1 (2016). Because the present case does not involve a sports league, *Northwestern*’s “peculiar” consideration is inapplicable. *Ibid.* Moreover, the issue in *Northwestern* was that the few private teams over which the Board had statutory jurisdiction would be *in competition with* many public teams over which the Board did not, creating a regulatory asymmetry among sports competitors that the Board concluded would destabilize labor relations. *Northwestern, supra*, slip op. at 5. Here, in addition to not being in a sports league, the University and the Employer are not competitors, so the same concerns regarding them being subject to different statutory frameworks do not exist.

III. THE RESPONSE TO THE BOARD’S INVITATION TO INTERESTED AMICI TO FILE BRIEFS SHOWS THAT NO ENTITY OTHER THAN THE EMPLOYER OPPOSES JURISDICTION

In granting the Employer’s Request for Review, the Board invited interested *amici* to weigh in regarding whether the Board should exercise its discretion to decline jurisdiction over the Employer. One *amicus* responded to the Board’s call: the AFL-CIO, who expressed agreement with the decision of the ARD and the position of the Union on the question of jurisdiction (AFL-CIO Br. at 1).¹ None of the other unions representing employees of the Employer responded. Nor, for the matter, did the University or the unions representing employees of the University. Finally, neither the Commonwealth of Pennsylvania nor the Pennsylvania Labor Relations Board (“PLRB”) responded.

A central theme of the Employer’s brief is that exercising jurisdiction over the Employer will affect the Employer’s bargaining relationships with other unions besides PASNAP who are not parties to this proceeding (Emp. Br. at 12-14, 16, 18-19) as well as the University’s operations (Emp. Br. at 11-12). The failure of any of the third parties whom the Employer alleges would be adversely impacted by the Board’s exercise of jurisdiction to heed the Board’s call for *amici* briefs or to otherwise attempt to participate in this case in any way discredits the Employer’s argument.

In *Pennsylvania Virtual Charter School*, 364 NLRB No. 87, slip op. at 9 (2016), the employer, a charter school, argued that the Board should exercise its discretion to decline

¹ The AFL-CIO also posited that the Board need not decide the second issue with regard to which it granted review—whether to extend comity to the unit certified by the Pennsylvania Labor Relations Board (“PLRB”) in 2006—in order to process the petition underlying this matter (AFL-CIO Br. at 2-6). The AFL-CIO stated that, should the Board disagree and decide it must address that issue, the AFL-CIO agreed with the ARD’s decision and the Union’s position (AFL-CIO Br. at 6).

jurisdiction over it because exercising jurisdiction would “effectively supplant state control over its own public education system and the state’s ability to regulate labor relations at those schools.” In rejecting this argument, the Board found it significant that “the Commonwealth of Pennsylvania ha[d] not intervened or otherwise endorsed the School’s position in this proceeding.” *Id.*, slip op. at 9 fn. 26. Similarly, in *Hyde Leadership Charter School—Brooklyn*, 364 NLRB No. 88, slip. op. at 8 (2016), the union seeking to represent employees at a New York charter school argued the Board should exercise its discretion to decline jurisdiction because “the state has a substantial interest in and responsibility for public education, and...public education is highly regulated by the state...[and] New York should continue to be allowed to promulgate policies concerning public education, including the manner in which charter schools are regulated.” In rejecting this argument, the Board found it significant that “neither the State of New York nor any state agency, including [New York’s Public Employee Relations Board], has sought to intervene or otherwise participate in this proceeding.” *Id.*, slip op. at 9 fn. 27.

Here, the Employer urges the Board to decline to exercise its jurisdiction because of vague, ominous references to disruption of labor relationships with unions other than PASNAP (Emp. Br. at 12-14, 16, 18-19) and potential difficulties for the University in conducting its operations (Emp. Br. at 4-12), just as the employer in *Pennsylvania Virtual* and the union in *Hyde Leadership* argued for a discretionary declination on the grounds that the state would lose control over public education if the Board asserted jurisdiction. However, if any of these entities had concerns about the Board exercising jurisdiction over the Employer, they had ample opportunity to convey those concerns to the Board, either by attempting to intervene in the proceedings before the ARD or by positively responding to the Board’s nationwide invitation for briefs from interested *amici*. The largest organization of labor organizations in the country, of

which at least several of the unions at TUH are members (Emp. Br. at 13-14), supported jurisdiction (AFL-CIO Br. at 1). The specific entities referenced by the Employer took no action. In these circumstances, the Board should discount the Employer's arguments regarding potential adverse impacts of exercising jurisdiction on third parties.² *Pennsylvania Virtual*, *supra*, slip op. at 9 fn. 26; *Hyde Leadership*, *supra*, slip op. at 9 fn. 27.

IV. THE EMPLOYER'S ARGUMENT THAT THE BOARD SHOULD DECLINE JURISDICTION OVER THE EMPLOYER BECAUSE THE UNION FILED THE PETITION FOR AN "IMPROPER PURPOSE" IS TOTALLY UNSUPPORTED BY THE ACT OR BOARD PRECEDENT

Although the Employer concedes that a union's motive for filing a petition is irrelevant to determining whether the Act conveys jurisdiction over the petition to the Board, it claims that the Board may properly "consider the parties' motives when the Board is deciding whether to exercise its discretion to decline jurisdiction" (Emp. Br. at 18). The Employer then asserts that the Union's motive for filing the present petition was "to further [its] financial goals," contending that the Union believed that the Board's assertion of jurisdiction over TUH would insulate it from a possible decision of the Supreme Court in *Friedrichs v. California Teachers*

² The Employer's claims about the supposed adverse impact of the Board asserting jurisdiction is further belied by the fact that Jeanes Hospital ("Jeanes"), one of the entities whom the Employer claims will suffer if the Board exercises jurisdiction in this matter, stipulated in a prior Board case that it was subject to the Board's jurisdiction (Pet. Exh. 1). In its Brief on Review, the Employer concedes that if the Board asserts jurisdiction over TUH, it will mean that the Board has jurisdiction over the other hospitals "under [Temple University Health Systems ('TUHS')]," including Jeanes (Emp. Br. at 11 fn. 14). The Employer then discusses how the Board's exercise of jurisdiction will throw labor relations at these hospitals, including Jeanes, "into disarray and [will] mean disruption" (Emp. Br. at 12-14).

However, in Board Case Number 04-RC-20366, Jeanes stipulated that it was an employer within the meaning of the Act (Pet. Exh. 1). This belies the Employer's nebulous, dire predictions about the impact on labor relations at Jeanes if the Board asserts jurisdiction here, as Jeanes would not have stipulated to being subject to the Board's jurisdiction if it thought doing so would be harmful.

Ass’n, 136 S.Ct. 1083 (2016), which was ultimately decided in the union’s favor (Emp. Br. at 17-19).³

The ARD was absolutely correct that a petitioner’s motive for filing a petition is irrelevant to whether the Board should exercise jurisdiction over the petition (ARD at 12 fn. 5). Certainly the Act does not indicate that a petitioner’s motive is relevant to whether the Board should process a petition. *See* 29 U.S.C. § 159(c). Indeed, the Board has explicitly held that “the motive of the Petitioners in filing the petition is irrelevant.” *E.g., Truth Tool Co.*, 111 NLRB 642, 643 (1955). The Employer’s argument that the Board should decline jurisdiction because the Union filed the petition for what the Employer considers an “improper purpose” is contrary to the Act and Board precedent and therefore should be rejected.⁴

V. THE EMPLOYER IS WRONG THAT THE UNIT OF PROFESSIONAL AND TECHNICAL EMPLOYEES CERTIFIED BY THE PLRB IN 2006 IS REPUGNANT TO THE ACT

The Employer argues that the Board should not extend comity to the unit of professional and technical employees certified by the PLRB in 2006 because that unit is “repugnant to the Act.” To support this argument, the Employer claims that the unit certified by the PLRB runs afoul of the Board’s Health Care Rule “because the unit contains both professional and technical

³ The Employer is wrong about the Union’s reasons for filing this petition. The ARD made no finding as to motivation, concluding that it was “not relevant” (ARD at 12 fn. 5). However, PASNAP did not abandon the petition after the *Friedrichs* case was decided in the union’s favor, demonstrating that something other than *Friedrichs* must have driven the Union’s actions in the present case. In any event, the ARD was absolutely correct that PASNAP’s reasons for filing the petition are totally irrelevant to whether the Board has and should assert jurisdiction.

⁴ The Employer can offer no legal support for its position since none exists. Indeed, that the Employer would raise such a patently meritless argument at this juncture of the case suggests that it views this proceeding merely as a vehicle for attacking and impugning the Petitioner rather than a serious legal exercise.

employees.” (Emp. Br. at 22.) Contrary to the Employer’s assertions, the unit does not run afoul of the Health Care Rule and, even if it did, it would not be repugnant to the Act.

The unit certified by the PLRB conforms to the Health Care Rule. First, the Employer completely misstates the Health Care Rule when it claims the Rule prohibits a unit “contain[ing] both professional and technical employees” (Emp. Br. at 22). In fact, the Rule states that, with certain exceptions, “the following shall be appropriate units, and the only appropriate units, for petitions filed pursuant to section 9(c)(1)(A)(i) or 9(c)(1)(B) of the National Labor Relations Act, as amended, except that, if sought by labor organizations, *various combinations of units may also be appropriate.*” 29 U.S.C. § 103.30 (emphasis added). Two of the listed units are “[a]ll professionals except for registered nurses and physicians” and “[a]ll technical employees.” 29 U.S.C. § 103.30. The unit certified by the PLRB in 2006 is a “combinatio[n]” of these units “sought by [a] labor organization[n],” namely PASNAP (ARD at 6). *Ibid.* The unit is therefore permitted by the Health Care Rule.

The unit also complies with the Health Care Rule on the independent ground that it is an “existing non-conforming uni[t].” 29 U.S.C. § 103.30. Under the Rule, such units need not comply with the eight units listed therein. *Ibid.* Where a union petitions to replace an incumbent union as the collective bargaining representative of a unit that pre-dated the Board’s Health Care Rule, the Board has held that the unit constitutes an “existing non-conforming unit” within the meaning of the Rule and is therefore appropriate. *Crittenton Hospital*, 328 NLRB 879, 880-81 (1999). This is exactly what occurred in the present case, where PASNAP petitioned to replace an incumbent union that had represented the unit in question since 1975, long before the adoption of the Board’s Health Care Rule in 1989. *See Temple University*, 6 PPER 126 (1975).

The unit certified by the PLRB in 2006 therefore conforms to the Health Care Rule because it is an “existing non-conforming uni[t]” as well. 29 CFR § 103.30.

Thus, the Employer is obviously incorrect that the unit certified by the PLRB runs afoul of the Health Care Rule. However, even if that unit did run afoul of the Health Care Rule, comity would still be appropriate. The law is clear that a “state agency’s unit determination...need not conform to Board precedent.” *Allegheny General*, 230 NLRB 954, 955 (1977), *enf. denied on other grounds* 608 F.2d 965 (3d Cir. 1979). Rather, all that is required is that “the unit established by the state agency not be repugnant to the Act.” *Ibid.* Nothing in *the Act* prohibits a unit of all professional employees and all technical employees in a health care institution (provided the professional employees were given a separate vote on inclusion with non-professional employees), even if the Employer were correct (which it is not) that “Board precedent” in the form of the Health Care Rule did prohibit such units. *See Doctors Osteopathic Hospital*, 242 NLRB 447, 448 fn. 6 (1979). Therefore, even assuming *arguendo* the unit deviated from Board precedent, it does not deviate from the Act, and comity is proper.

The Employer misstates the Board’s holding in *Mental Health Center of Boulder County*, 222 NLRB 901 (1976) in contending that this decision somehow means that units combining professional and non-professional employees are *per se* repugnant to the Act (Emp. Br. at 24). This is not at all what the Board held. Instead, in *Boulder County*, the Board found the unit certified by the state repugnant to the Act not because it combined professional and non-professional employees, but rather because it did so without giving the professional employees a separate vote on whether they wished to be included in a unit with non-professional employees, which Section 9(b)(1) of the Act expressly requires they be given. *Boulder County*, *supra* at

901-02. Here, professionals were given a separate vote and voted for inclusion (ARD at 6-7). Therefore, the Board's reasons for declining comity in *Mental Health* are inapposite.

The Employer similarly misstates the holding of *Albert Einstein Medical Center*, 248 NLRB 63, 65 (1980) (Emp. Br. at 24). There, the Board declined to extend comity to a PLRB certification of a unit of all registered nurses and licensed practical nurses ("LPNs"), but excluding technical employees other than LPNs. *Ibid.* The Board declined comity because "absent special circumstances, the Board has declined to direct elections in combined units of LPNs and RNs which excluded other technical employees." *Ibid.* Implicitly, then, the Board indicated that it *would* extend comity to combined units of LPNs and RNs which *included* other technical employees. *See ibid.* Here, the unit certified by the PLRB includes all professional employees and all technical employees—it does not peel off one subcategory of technical employee and throw it into a professionals unit (ARD at 6). Therefore, *Albert Einstein* actually *supports* extending comity, not declining to do so.

VI. CONCLUSION

For all of the foregoing reasons and the reasons set forth in the Union's Opposition to the Request for Review and Brief on Review, the Board should assert jurisdiction over TUH and extend comity to the unit certified by the PLRB in 2006.

Respectfully submitted,

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